IN THE SUPREME COURT OF MISSOURI

SC86952

STATE OF MISSOURI EX REL ST. LOUIS POST-DISPATCH, LLC, ET AL

RELATOR

vs.

THE HONORABLE JOHN F. GARVEY, JR.

RESPONDENT

On the Petition for Writ of Prohibition or, in the alternative, for Mandamus

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SUBSTITUTE BRIEF FOR RESPONDENT, HONORABLE JOHN F. GARVEY, JR.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTIONAL PROVISION:

STATUTES:

ACTS:

JURISDICTIONAL STATEMENT

Article V, §10 of the Missouri Constitution provides that a case is to be transferred to this Court by order of this Court.

83.09 MRCP provides that any case coming to the Supreme Court on Transfer is to be determined as if the case were filed originally in this Court. Any case transferred to this Court has the effect of withdrawing the court of appeals opinion. Johnston v. Sweany, 68 S.W.3d 398, 405 (Mo.banc 2002).

Therefor this matter is properly before this Court as original proceedings for Writ of Prohibition or in the alternative for Mandamus.

STATEMENT OF FACTS

Respondent is the presiding judge of the Juvenile Division of Twenty-Second Judicial Circuit (St. Louis City). Respondent is presiding over a juvenile case knows as *In the Interest of L.K.*. In the case, the child came under the jurisdiction of the Juvenile having been charged with Murder in the First Degree. If the charges are upheld, the charge would constitute a Class A Felony if filed against an adult.

On March 3, 2005, Respondent granted a motion, filed upon behalf of the child, to close the proceedings. On the same day, Relator St. Louis Post-Dispatch filed an application for a Petition for Writ of Prohibition or, in the Alternative, for Mandamus in the Eastern District of the Missouri Court of Appeals. The purpose of the Application was to force Respondent to open the proceedings regarding the Child. On the March 4, 2005, the Appellate Court entered a preliminary order of prohibition. On or about March 7, 2005, Relator St. Louis Post-Dispatch filed an Amended Petition. On or about March 10, 2005, Relator Multi-Media filed a Motion to Intervene. After briefs and Memorandum filed on behalf of Respondent, the Court of Appeals granted in part and quashed in part the preliminary order on March 29, 2005.

On April 7, 2005, the Relator St. Louis Post-Dispatch filed its Motion

for Rehearing. On May 3, 2005, the Court of Appeals issued a new opinion, withdrawing its March 29, 2005 opinion. On May 17, 2005, Relator St. Louis Post-Dispatch filed its application for transfer to this Court, which was denied. On July 12, 2005, Relators filed a Motion to Transfer their Petition for Writ after the decision by the Court of Appeals. Relator Multi-Media filed its motion to Intervene in this Court on July 14, 2005. The Motion to Transfer was granted on August 30, 2005.

POINTS RELIED ON

I. THE RELATORS ARE NOT ENTITLED TO RELIEF AS PRAYED BECAUSE THE SCOPE OF THE SUPREME COURT'S REVIEW IS TO INTERPRET AND APPLY THE LAW, NOT TO DECIDE WHAT IS GOOD PUBLIC POLICY.

Budding v. SSM Healthcare System, 19 S.W.3d 678, 682 (Mo.banc 2000)

II. THE RELATORS ARE NOT ENTITLED TO RELIEF AS PRAYED BECAUSE §211.171.6 RSMO DOES NOT PROVIDE FOR TOTAL PUBLIC DISCLOSURE OF JUVENILE COURT PROCEEDINGS.

State ex Rel. Golden V. Crawford (Mo.banc 2005)

III. THE RELATORS ARE NOT ENTITLED TO RELIEF AS PRAYED BECAUSE TERTIARY SOURCES ARE NOT ACCEPTABLE METHODS OF DISCERNING LEGISLATIVE HISTORY.

Valley Vista Services v. City of Monterey Park, 118 Cal.App.4th 881, 891 (2004).

Hulcher v. Commonwealth, 39 Va. App. 601, 609 (2003) 575 S.E.2d 579.

Tibbetts v. Van De Kamp, 222 Cal.App.3d 389,396 (1990); 271 Cal.Rptr. 792.

Newspapers v. Dayton, 23 Ohio Misc. 49, 53 (1970) 259 N.E.2d 522

IV. CONCLUSION.

ARGUMENT

I. THE RELATORS ARE NOT ENTITLED TO RELIEF AS PRAYED BECAUSE THE SCOPE OF THE SUPREME COURT'S REVIEW IS TO INTERPRET AND APPLY THE LAW, NOT TO DECIDE WHAT IS GOOD PUBLIC POLICY.

Relators ask this Court to judicially amend the actions of the State Legislature by changing the word "hearing" to "all proceedings" in all of the provisions of §211.171 RSMo.

While Relators spend some considerable time discussing what might be good public policy regarding the disclosure of Juvenile proceedings, the Supreme Court may not substitute its judgment for that of the Legislature.

> **"The legislature has spoken with reasonable clarity expressing an intent to eliminate liability of health care providers for strict products liability. All canons of statutory construction are subordinate to the requirement that the Court ascertain and apply the statute in a manner consistent with that legislative intent. Butler v. Mitchell-Hugeback, Inc., 895 S.W.2d**

15, 19 (Mo.banc 1995). As the briefs of the parties point out, appealing public policy arguments can be made both for and against imposing strict liability where a health care provider transfers a defective product to a patient. However, when the legislature has spoken on the subject, the courts must defer to its determinations of public policy." Budding v. SSM Healthcare System, 19 S.W.3d 678, 682 (Mo.banc 2000)

This Court is bound to determine the intent of the State Legislature. The extended discussion of what might be good public policy is one that the Relators should address to the Missouri Legislature, not to this Supreme Court.

Therefor, regardless of what the members of this Court think should be the public policy regarding the disclosure of Juvenile proceedings and records, when the Legislature has spoken, this Court is bound to follow that policy.

II. THE RELATORS ARE NOT ENTITLED TO RELIEF AS PRAYED BECAUSE §211.171.6 RSMO DOES NOT PROVIDE FOR TOTAL PUBLIC DISCLOSURE OF JUVENILE COURT PROCEEDINGS.

The section of the Missouri Statutes upon which Relators rely is but one portion of a comprehensive revision of the way Juveniles are treated in Missouri, which was enacted by the Missouri Legislature in HB 1453, in 2004. The Bill repealed and enacted seventy-one new sections relating to the state foster care and protective services for children, with penalty provisions and an emergency clause. [1] **One of the sections affected is § 211.171 RSMo.**

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[1] **See HB 1453, approved by the governor June 29, 2004. During the course of its legislative journey, the bill was amended in the House Committee, the House, the Senate, and ultimately by the House/Senate Conference Committee. None of the amendments made during the legislative**

In interpreting the statutes, this Court is bound first to look at the plain language of the statute.

> **"The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to consider the words in their plain and ordinary meaning." State ex Rel. Golden V. Crawford (Mo.banc 2005).**
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> **(See also: International Bus. Mach. v. Director, Revenue, 958 S.W.2d 554, 557 (Mo.banc 1997); and State ex Rel. BP Products v. Ross, 163 S.W.3d 922, 927 (Mo.banc 2005).)**

Clearly the legislature understood the difference between the words "hearing" and "proceedings". Within the provisions of § 211.171 RSMo, the plural word "proceedings" appears only in § 211.171.7 RSMo. In all other portions of §211.171 RSMo, the phrase used is the singular "hearing".

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journey affected the provisions of what ultimately became §211.171.6.

§211.171 RSMo does not deal with all proceedings before the Juvenile court. The section deals only with "the hearing."

> **"The procedure to be followed at the hearing . . . " § 211.171.1 RSMo. (Emphasis added.)**
>
> **"The hearing may, in the discretion of the court, proceed . . . " § 211.171.2 RSMo (emphasis added.)**
>
> **"Stenographic notes or an authorized recording of the hearing shall be required . . . " § 211.171.5 RSMo (Emphasis added.)**

§211.171.6 RSMo stands alone in referring to a circumstance when the general public is not to be excluded. The statute reaffirms the policy of the State that, in Juvenile matters, the general public shall be excluded. The statute is clear.

> **"The general public shall be excluded and only such persons admitted as have a direct interest in the case or in the work of the court except in cases where the child is accused of conduct which, if committed by an adult, would be considered a class A or B felony; or**

for conduct which would be considered a class C felony, if the child has previously been formally adjudicated for the commission of two or more unrelated acts which would have been class A, B or C felonies, if committed by an adult.

Within the confines of HB 1453, there are various references to "the hearing". A review of theses instances will be helpful to understand the intent of the Legislature. One of these instances appears in a section enacting a new §211.032 RSMo. This section illustrates that the General Assembly understands the difference between singular and plural hearings.

"§211.032. 1. Except as otherwise provided in a circuit participating in a pilot project established by the Missouri supreme court, when a child or person seventeen years of age, alleged to be in need of care and treatment pursuant to subdivision (1) of subsection 1 of section 211.031, is taken into custody, the juvenile or family court shall notify the parties of the right to have a protective custody hearing. Such notification shall be in writing.

2. Upon request from any party, the court shall hold a protective custody hearing. Such hearing shall be held within three days of the request for a hearing, excluding Saturdays, Sundays and legal holidays. For circuits participating in a pilot project established by the Missouri supreme court, the parties shall be notified at the status conference of their right to request a protective custody hearing.

4. The court shall hold an adjudication hearing no later than sixty days after the child has been taken into custody. The court shall notify the parties in writing of the specific date, time, and place of such hearing. If at such hearing the court determines that sufficient cause exists for the child to remain in the custody of the state, the court shall conduct a dispositional hearing no later than ninety days after the child has been taken into custody and shall conduct review hearings regarding the reunification efforts made by the division every ninety to one

hundred twenty days for the first year the child is in the custody of the division. After the first year, review hearings shall be held as necessary, but in no event less than once every six months for as long as the child is in the custody of the division.

5. At all hearings held pursuant to this section the court may receive testimony and other evidence relevant to the necessity of detaining the child out of the custody of the parents, guardian or custodian.

6. By January 1, 2005, the Supreme Court shall develop rules regarding the effect of untimely hearings."

(Emphasis added.)

(L. 1995 S.B. 174, A.L. 2004 H.B. 1453) Effective 7-1-04

Relators are asking this Court to ignore the clear language of the Legislature and to repudiate the Legislature and to amend § 211.171 RSMo by changing the words "the hearing" to "all proceedings" or at the very least "all hearings". The Legislature's use of the words "hearing", "hearings",

"proceeding" and "proceedings" at various times in HB 1453 would certainly seem to reflect that the Legislature understood the difference between the singular and the plural, between a "hearing" and a "proceeding."

§211.171 RSMo.

> **1. The procedure to be followed at *the hearing* shall be determined by the juvenile court judge and may be as formal or informal as he or she considers desirable, consistent with constitutional and statutory requirements. The judge may take testimony and inquire into the habits, surroundings, conditions and tendencies of the child and the family to enable the court to render such order or judgment as will best promote the welfare of the child and carry out the objectives of this chapter.**
>
> **2. *The hearing* may, in the discretion of the court, proceed in the absence of the child and may be adjourned from time to time.**
>
> **3. The current foster parents of a child, or any preadoptive parent or relative currently providing**

care for the child, shall be provided with notice of, and an opportunity to be heard in, *any* [permanency or other review] *hearing* to be held with respect to the child. This subsection shall not be construed to require that any such foster parent, preadoptive parent or relative providing care for a child be made a party to the case solely on the basis of such notice and opportunity to be heard.

5. Stenographic notes or an authorized recording of *the hearing* shall be required if the court so orders or, if requested by any party interested in the proceeding.

7. The practice and procedure customary in proceedings in equity shall govern all proceedings in the juvenile court; except that, the court shall not grant a continuance in such proceedings absent compelling extenuating circumstances, and in such cases, the court shall make written findings on the record detailing the specific reasons for granting a

continuance.

(Emphasis added.)

§211.171.6 currently reads:

> **"The general public shall be excluded and only such persons admitted as have a direct interest in the case or in the work of the court except in cases where the child is accused of conduct which, if committed by an adult, would be considered a class A or B felony; or for conduct which would be considered a class C felony, if the child has previously been formally adjudicated for the commission of two or more unrelated acts which would have been class A, B or C felonies, if committed by an adult."**

There is nothing in HB 1453, or any of its components to support Relators' contention.

But we are confronted with the question that the Legislature must have meant something by making provisions for excluding the general public except in circumstances when a child is accused of committing felonies. We can reconcile the seeming conflict between the two provisions. We would

suggest to the Court that the Legislature has in fact given us the answer.

In §211.071 RSMo, the legislature has made specific references to dealing with a child accused of conduct which would be a felony if committed by an adult, and sets out the procedure for certifying the child as an adult, making specific reference to the provisions of §211.171 RSMo. We suggest that the "hearing" referenced in §211.171.6 RSMo is the hearing at which §211.071 RSMo refers, the hearing at which it is determined if the child is to be certified as an adult.

> **"§211.071.**
>
> **"1. If a petition alleges that a child between the ages of twelve and seventeen has committed an offense which would be considered a felony if committed by an adult, the court may, upon its own motion or upon motion by the juvenile officer, the child or the child's custodian, order a hearing and may, in its discretion, dismiss the petition and such child may be transferred to the court of general jurisdiction and prosecuted under the general law; except that if a petition alleges that any child has committed an offense which would**

be considered first degree murder under section 565.020, RSMo, second degree murder under section 565.021, RSMo, first degree assault under section 565.050, RSMo, forcible rape under section 566.030, RSMo, forcible sodomy under section 566.060, RSMo, first degree robbery under section 569.020, RSMo, or distribution of drugs under section 195.211, RSMo, or has committed two or more prior unrelated offenses which would be felonies if committed by an adult, the court shall order a hearing, and may in its discretion, dismiss the petition and transfer the child to a court of general jurisdiction for prosecution under the general law.

"11. If the court does not dismiss the petition to permit the child to be prosecuted under the general law, it shall set a date for the hearing upon the petition as provided in section 211.171."

The hearing referenced in §211.171.6 RSMo would seem to be the hearing at which a child is certified as an adult under §211.071 RSMo.

Therefor, we suggest that the “hearing” at which the Relators may be admitted would the be “certification” hearing.

III. THE RELATORS ARE NOT ENTITLED TO RELIEF AS PRAYED BECAUSE TERTIARY SOURCES ARE NOT ACCEPTABLE METHODS OF DISCERNING LEGISLATIVE HISTORY.

Relators' alleged history of §211.171.6 RSMo would be interesting except for the fact that the "history" for the 1995 enactment of the section, on which Relators rely for their discussion, consists of a series of newspaper articles. Such newspaper accounts are universally rejected by the courts as part of the "legislative history".

> **"During oral argument, counsel for Valley Vista asked us to consider as part of our analysis a local newspaper article contained within the legislative history of the 1998 amendment to section 49520, which supposedly mentioned an instance where a city complained that during a trash hauler's phase-out period, it began competing with the new holder of an exclusive franchise. We have reviewed that news story, which accompanies numerous letters from trash haulers and other members of the public expressing their opinions about the proposed**

legislation. There is no indication the incident or the article was ever considered by the Legislature. Regardless, such articles are generally not considered part of a statute's legislative history. (Tibbetts v. Van de Kamp (1990) 222 Cal.App.3d 389, 395, fn. 5 [271 Cal.Rptr. 792].)" Valley Vista Services v. City of Monterey Park, 118 Cal.App.4th 881, 891 (2004) (Emphasis added.)

"We decline appellant's invitation to consider newspaper and journal articles written contemporaneously with the passage of the concealment statute as an appropriate source of "legislative history." See, e.g., Mitchell v. Rayl, 665 P.2d 1117, 1119 (Kan.Ct.App. 1983) (rejecting newspaper article as conclusive proof of legislative intent); 2A Norman J. Singer, Sutherland's Statutes & Statutory Construction § 48.11, at 461 (6th ed., 2000 rev.)." Hulcher v. Commonwealth, 39 Va. App. 601, 609 (2003) 575 S.E.2d 579 (Emphasis added)

"The legislative history as presented by the parties is far from definitive as it is based largely upon newspaper articles. Generally, newspaper articles are inadmissible to prove their contents because of the hearsay rule (Stoneking v. Briggs (1967) 254 Cal.App.2d 563, 576 [62 Cal.Rptr. 249]), and should not be authority for the definition of criminal offenses." Tibbetts v. Van De Kamp, 222 Cal.App.3d 389,396 (1990); 271 Cal.Rptr. 792 (Emphasis added)

"Newspaper accounts of political rallies are not official records or legislative history. They represent individual sentiments (as described in the Ohio Constitution) that are privately evaluated and edited before release. They are an unreliable source for charter or legislative interpretation." Newspapers v. Dayton, 23 Ohio Misc. 49, 53 (1970) 259 N.E.2d 522 (Emphasis added.)

Relators also reference a "summary" of a 1995 Act. Relators claim that

the original language of §211.171.6 RSMo was enacted in 1995 as a part of HB 174. Relators rely on a "*summary*" of HB 174. The language, quoted by Relators, "... (3) Makes public the record of the proceedings in juvenile court if the child has been accused of any offense which, if committed by an adult, would be a class A or B felony ..." (Emphasis added.) By 1998, this provision, if it ever existed, was repealed and ceased to exist. SB 674 (1998) repealed the then existing §211.171 without enacting any new provision. There is nothing to suggest that the phrase relied upon by Relators was ever reenacted.

> **"S.B. No. 674 of 1998**
>
> **"Makes technical changes to state adoption laws.**
>
> **AN ACT To repeal sections 210.720, 211.183, 376.816 and 453.160, RSMo 1994, and sections 192.016, 211.171, 211.444, 211.447, 211.464, 452.402, 453.025, 453.030, 453.040, 453.060, 453.070, 453.075, 453.077, 453.080, 453.112 and 453.170, RSMo Supp. 1997, and to enact in lieu thereof twenty new sections for the purpose of complying with the federal mandates and providing permanency for children in alternative care, with an emergency clause for certain sections."**

Since Relators offer of a third hand legislative history is defective, the Relators' argument that all proceedings are covered by the statute is unsupported and should be rejected.

CONCLUSION.

Relators ask this Court to open all proceedings of the Juvenile Court relating to this child. There is nothing in the Statutes, which indicate the Legislature had intended all proceedings to be open to the public in all circumstances. Relators' Petition is overreaching, and should therefor be denied.

It is difficult to imagine how much more information of legitimate public value could be obtained by the Relators than they have already gained access. We refer to the news articles published by Relator Post-Dispatch attached as an exhibit to the Respondent's Amended Motion to Dismiss. The constraints imposed by the Judge Garvey have not limited the Relators' news sources.

It is not our intent to impugn the motives of Relators in this action. We raise this point to illustrate that the intent and purpose of the Juvenile Code and Court are not necessarily the same as the Media's interest in publishing.

For these reasons, Relator move that the Petition of Relators be dismissed, and for such other orders as this Court shall deem meet and just.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and forgoing brief have been served upon the parties hereto by depositing the same, postage prepaid, this 28th day of September 2005, addressed to:

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CERTIFICATE OF COMPLIANCE PURSUANT TO MRCP 84.06

I hereby certify that this brief complies with Supreme Court Rules 55.03 and 84.06(b) and is typed in Times New Roman 14 point type and contains 3933 Words including the cover, certificate of service and certificate of compliance required by Rule 84.06, signature block and appendix.

I also certify tat the computer diskettes that I am providing have been scanned for viruses and has been found to be virus-free.

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